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DISCUSSION

Combatting the legal side effects of privatized war

What has been achieved, and what still needs to be done in international legal scholarship on Private Military and Security Companies

MIRKO SOSSAI — 9 October, 2017

This contribution continues our journal cooperation with the journal "Swiss Review of International & European Law".

Over the past twenty years a lively debate on the regulation of private military and security companies (PMSCs) in situations of armed conflict has developed. The time has come for an appraisal of the rich literature on the phenomenon. This post which is written in the context of the journal cooperation with the Swiss Review of International and European Law (SRIEL) takes the article by

Frauke Renz on the legal status of contractors involved in combat air patrol missions under international humanitarian law (IHL) published in the latest issue as a chance to make some tentative remarks on the main trends in international law scholarship and to highlight the remaining gaps and challenges.

I would suggest that at least three phases mark the evolution of the extensive interest in the legal implication of the so-called privatization of warfare: whereas at least initially the emphasis on anti-mercenary norms shaped the debate on the legality of the PMSCs' activities, a second wave of scholarship has then sought to explain why the respect for IHL and human rights (HR) obligations requires States to regulate this industry. In a third phase the attention has shifted to reform options for redressing the regulatory gaps at the domestic level, in order to prevent violations and, if they take place, to avoid impunity.

The image that emerges is that legal scholarship has been guided by the assumption that the problem is not so much the absence of law at the international level, but rather a lack of clarity as for the content of the applicable rules and the persistent weaknesses in their implementation. Major points of disagreement exist regarding the overall assessment of the different regulatory options to comply with such international standards. Interestingly, criticism has been raised against the limited scope of legal research in this field and, eventually, its lack of originality, insofar as it tends to focus on the practice of few states (mainly USA and UK), while neglecting that of other countries and non-state actors, and to give strong preference to the employment of PMSCs in war scenarios, whereas private contractors nowadays mainly operate in non-conflict situations. Other

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IR scholars raised the question whether the claim for additional regulation might even generate new legitimate areas of activity and roles for the industry.

First phase: PMSCs as mercenaries of the XXI century?

In the initial phase, episodes of abuses committed by private contractors particularly in Iraq and Afghanistan shocked public opinion so much that some commentators wondered whether PMSCs operated in a legal vacuum, while others claimed that they should be banned under the existing norms on mercenaries. The focus on hiring states and the concern that they would be able to circumvent accountability by outsourcing certain functions also explain the attention that international lawyers paid to the question whether the conduct of PMSCs would represent a challenge for the attribution criteria under the law of state responsibility.

Second phase: The role of IHL and human rights in the governance of PMSCs

The increasing awareness that both IHL and HR indeed provide a binding legal framework for PMSCs characterized the second phase. Since 2004, a number of studies have focused on the question of the status of private contractors under IHL: a crucial issue, indeed, as it determines the rights and the privileges afforded by the law and the legal consequences of the conduct of those persons. Already the early codifications of IHL recognized the existence of "persons who accompany the armed forces without actually being members thereof". General agreement has been found that PMSC personnel usually are not combatants but civilians: it follows that they do not have the right to take

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direct part in the hostilities, and that they lose their protection against direct attack, if they do so.

***Intermezzo.* Direct participation in hostilities, an implicit limit to privatization**

This explains the continuing relevance of the debate concerning the activities amounting to direct participation in hostilities, also as part of the attempt made by some scholars to individuate legal limits to privatization of certain 'public functions': suffice here to recall that, though IHL explicitly assigns only few activities to the members of the States' armed forces, the respect in good faith for the principle of distinction between civilians and combatants might preclude States from entrusting PMSCs with tasks amounting to a direct participation in hostilities (DPH).

As States rely on PMSCs for a variety of tasks, such practice has represented an excellent chance for legal experts to test the three constitutive elements of the notion of DPH, as developed by the 2009 ICRC Interpretive Guidance. The added value of more recent scholarly contributions on the topic, including the analysis carried out by Frauke Renz, is twofold: (1) raising the awareness on the new tasks assigned to private firms; (2) suggesting, in any event, a narrow definition of DPH. There is no doubt that the maintenance and operation of drones has been the subject of much debate: alarm was expressed at the growing civilian role, by observing that military drones should be operated only by those who "wear a uniform [and] are trained in the law of armed conflict".

What the second wave has achieved: IHL and HR positive obligations require States to regulate PMSCs

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The question of the limits to the privatization of tasks previously exercised by members of the armed forces has been very much influenced by the US policy prohibiting the outsourcing of "inherently governmental functions". The issue of the involvement of PMSCs in combat operations has just reemerged a few weeks ago, as media reported on meetings between President Trump and Erik Prince, founder of Blackwater, to discuss plans for privatizing a portion of US operations in Afghanistan. The first reactions by the academic community expressed skepticism and concern; others recalled that IHL imposes obligations on the US, as is made clear by the Montreux Document on Pertinent Legal Obligations and Good Practices for States Related Operations of Private Military and Security Companies During Armed Conflict.

Adopted in 2008, as the result of an initiative launched by Switzerland and the ICRC, the Montreux document represented the culmination of a process – in which different stakeholders, including academics, were involved – aimed at clarifying the content of States' obligations to ensure respect for IHL and HR law by the PMSCs hired by them, as well as by those incorporated or operating within their territory. This means that States are required to adopt "such legislative and other measures as may be necessary to give effect to these obligations", as well as "to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel". 2018 will mark the tenth anniversary of the Montreux Document: official support for the initiative has grown from 17 to 54 States (including the US) and three international organizations, though vast portions of the world remain excluded.

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Third phase: Between self-regulation and domestic legislation

The third and last moment of this periodization is characterized by the question whether new rules need to be adopted. In recent years, actors other than States have increasingly contracted PMSCs, including the United Nations, and, most importantly, new regulatory initiatives have been taken at the international level. Whereas the chance of successfully reaching an agreement on a UN Convention remains rather low, the finalization of the International Code of Conduct for Private Security Service Providers (ICoC) was welcomed as a positive step towards better governance, compliance and accountability of PMSCs, particularly because of its oversight mechanism based on the ICoC Association.

The adoption of codes of conduct and, more generally, the development of self-regulatory efforts have attracted the attention of scholars belonging to different methodological approaches: for instance, the ICoC is being analyzed through the lenses of the UN Guiding Principles on business and human rights, while other authors see the ICoC as a manifestation of transnational private regulation or of transnational business governance.

The way forward: Towards effective accountability of PMSCs?

My view is that codes of conducts should only take a complementary function, since regulation of PMSCs should remain the primary role of the State, through binding legislation. There is the concrete risk that States might take the view that participation and membership of ICoC and

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ICoCA as such would be enough to meet their due diligence obligations under international law. This is not the case. Moreover, there is the need to avoid competing and even colliding regulatory initiatives: one idea, for example, would be that the ICoC should be incorporated in any contract between the PSC and the client.

A major concern has been the impunity of PMSCs in many scenarios. This explains why it is a shared view that one of the biggest challenges remains that of developing effective and coherent regulation at domestic level, which should address at least the following elements: the existence of limits on outsourcing; the criteria and procedures for the authorizations, selection and contracting of PMSCs; a monitoring system for PMSCs activities; as well as an effective accountability framework. This is an area ripe for further investigation and even imagination, keeping in mind that domestic legislation risks to be both retrospective (i.e. filling in old regulatory gaps while the PMSC industry moves forward) and introspective, being limited to the territory.

The multinational character of large part of this industry is in fact a crucial factor that contributes to the absence of accountability: as the UN working group on the use of mercenaries has recently noted, "the absence of extraterritorial jurisdiction in the majority of jurisdictions [...] is a significant impediment to accountability and to the availability of judicial remedy in the home State, considering the transnational nature of companies, particularly large companies, within the private military and security industry".

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